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No. 86-1032

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

MORRIS THIGPEN, ET AL.
Petitioners

v.

KENNETH W. WHEAT
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondent, Kenneth Wheat, respectfully prays that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

STATEMENT OF CASE

The Court of Appeals below affirmed the district court's partial grant of habeas corpus relief and order that a new capital sentencing hearing be held, because the prosecutor's closing argument at the penalty phase went considerably beyond the argument found constitutionally offensive in Caldwell v. Mississippi, 472 U.S. ___, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

In this case, the prosecutor argued to the jury that any decision to impose the death penalty would be reviewed by four separate courts: the trial court, the "nine" justices on the Mississippi Supreme Court, "the Supreme Court in Washington", and the federal courts. He erroneously told the jury that the trial court would "review your decision at a later time to see if you've made any errors". He described the members of

the Mississippi Supreme Court as men of "wisdom, and knowledge and compassion and mercy, and understanding and legal experience", thereby, implying that they had the power to grant mercy if a mistake had been made. Pet. App. A. 24-25. [1] Thereafter, he misled the jury by stating that their decision about the sentence was reviewable and not "final":

> Again I say to you, and then I'll leave it to you, just remember this, if your verdict is that of the death penalty, that's not final. There's so many more people who will look at this case after you have made your decision in this case. Others will look at your work and see if you made the right decision. And I can assure you, Ladies and Gentlemen, that if one finds that you have not, that they will send him back, and tell us to try it over because some one made a mistake.
>
> [Objection overruled].

Id. at 25-26.

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[1] The relevant portions of the prosecutor's closing arguments are set forth in the Court of Appeal's decision and in Petitioner's Appendix A. 24-26.

As found by the courts below, this argument is clearly unconstitutional under Caldwell v. Mississippi, where this Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 86 L.Ed.2d at 239. The Court concluded that an argument that the jury's decision on punishment was "automatically reviewable" by the Mississippi Supreme Court "sought to give the jury a view of its role . . . that was fundamentally incompatible with the Eighth Amendment's heightened 'need for reliability'" in the determination of punishment. Id. at 246. The Court found arguments that the sentence would be reviewed minimized the jury's sense of responsibility, id. at 240-241, and were misleading, inaccurate

and "wholly irrelevant to the determination of an appropriate sentence." Id. at 243-244. [2]

The conclusions by the district court and the Court of Appeals that the prosecutor's argument rendered the imposition of Mr. Wheat's death sentence fundamentally unfair in violation of the Eighth and Fourteenth Amendments, under this Court's opinion in Caldwell, is not challenged by Petitioner, the State of Mississippi.

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[2] As observed by the courts below in this case, even Chief Justice Rhenquist, dissenting in Caldwell, indicated that "had the prosecutor in this case actually . . . argued to the jury that it should go ahead and impose the death sentence because it did not really matter -- the appellate court would correct any 'mistake' the jury might make in choice of sentence -- and if the trial judge had not corrected such an argument, I might well agree that the process afforded did not comport with some constitutional norm related to procedural fairness". 86 L.Ed.2d at 252. Such an argument was made in Mr. Wheat's case.

SUMMARY OF ARGUMENT

The prosecutor at the sentencing phase of Mr. Wheat's capital trial expressly and erroneously assured the jury that reviewing courts would look at their decision as to the sentence and determine whether or not they made a "mistake". There is no question, nor does the State argue to the contrary, that this argument violates the principles announced in Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), where the Court found that virtually identical remarks by a prosecutor were in violation of the Eighth Amendment.

Moreover, the courts below were correct in reviewing the merits of Mr. Wheat's claim. All of the federal courts below, after surveying Mississippi decisional law, concluded

that because the Mississippi Supreme Court, invoked for the first time in Mr. Wheat's case a procedural bar that had not previously announced or consistently applied to other litigants, the state rule did not constitute an independent and adequate state law ground to which the federal courts were required to defer. See Wheat v. Thigpen, 431 So.2d 486 (Miss. 1983); King v. Thigpen, 441 So.2d 1365 (Miss. 1983)(Robertson, J., dissenting); Evans v. State, 441 So.2d 520 (Miss. 1983)(Robertson, J., dissenting). Because this Court has consistantly indicated that only state procedural bars which are clearly announced and consistently applied to other litigants prevent federal review of constitutional claims, no substantial question of federal law exists. James v. Kentucky, 466 U.S. 341 (1986).

The decision of the Court of Appeals represents nothing more than a Federal

Court of Appeals analyzing state decisional law within its circuit and applying established precedent of this Court. Because this Court customarily defers to Federal Courts of Appeals on questions of state law, and the state courts' use of procedural bars, Rummel v. Estelle, 445 U.S. 243, 267, n.7 (1980), there is no reason to review the decision below and, certiorari should not be granted.

REASONS FOR DENYING THE WRIT

The State has not presented any substantial question of federal law which has not been settled by this Court, nor has it demonstrated that the decision by the Court of Appeals conflicts with decisions by other courts or this Court.

ARGUMENT

The Courts Below Were Correct in Reviewing the Merits of Mr. Wheat's Claims of Prosecutorial Misconduct

In its decision, the Court of Appeals, presented with the identical arguments made by the State in its petition to this Court, undertook a review of Mr. Wheat's claim that the prosecutor's closing argument at sentencing rendered his death sentence unconstitutional. Because the decision of the Court of Appeals rests on established precedent of this Court, no substantial question of federal law is presented.

As in Caldwell, there was objection to the offending argument at Mr. Wheat's trial. The issue was presented to the Mississippi Supreme Court, not on direct appeal, but in Mr. Wheat's application for post-conviction relief, which at the time was an acceptable procedure to

present claims of error in capital cases. However, in a marked departure from its previous decisions, the Mississippi court refused to review the claim, instead announcing for the first time a new, strict bar to the consideration of such claims. Wheat v. Thigpen, 431 So.2d 486, 488 (Miss. 1983).

As the Court of Appeals recognized, ordinarily federal courts will not review the merits of federal claims which the state court has found to be forfeited absent a showing of cause and prejudice. The Court of Appeals expressed the principles of comity which underlie this general rule:

> The Supreme Court "has long recognized that in some circumstances considerations of comity and concerns for the administration of criminal justice require that a federal court forego the exercise of its habeas corpus power. Francis v. Henderson, 425 U.S. 536, 539 (1976) . . . The Supreme Court has specifically held that a feeral court may not review a habeas petitioner's federal claims when the state courts have declined

to pass on the claims because of an independent and adequate state procedural ground, absent a showing of cause and prejudice. Engle v. Issac, 456 U.S. 107, 129 (1982); Wainwright v. Sykes, 433 U.S. 72, 87 (1977).

A. 6-7, 793 F.2d 624.

However, as stated by this Court and recognized by the courts below, federal courts will not defer to a state procedural bar unless the state court relied on procedural rules and requirements which were clearly announced to the defendant and his counsel, which were in force at the time of his trial or appeal and which are fairly applied to all litigants. James v. Kentucky, 466 U.S. 341, 348 (1984) (only state procedural rules which are "firmly established and regularly followed . . . can prevent implementation of federal constitutional rights"); Hathorn v. Lavorn, 457 U.S. 255 (1982); Henry v. Mississippi, 379 U.S. 443, 448 n. 3 (1965). Moreover, because such

procedural defaults "prevent implementation of a fedral right[,] . . . the question of how and when defaults in compliance with state procedural law rules can preclude [the] consideration of a federal question is itself a federal question." Henry v. Mississippi, 379 U.S. at 447.

Thus, the Court of Appeals was required to determine whether the procedural bar involved in Mr. Wheat's case was clearly announced to litigants and their counsel and fairly and consistently applied. Such an analysis is consistent with the analysis used by all other federal courts that have addressed the issue. See, e.g., Spencer v. Zant, 781 F.2d 1458 (11th Cir. 1986)(en banc)(court is not precluded from reviewing claim by state procedural bar which was retroactively applied and unfair in its treatment of habeas petitioner's claim); Granviel v.

Estelle, 655 F.2d 673, 679 (5th Cir. 1981), cert. denied, 455 U.S. 1003 (1982) ("We cannot enforce against Granviel a contemporaneous objection rule that apparently did not even exist at the time of his trial"); Lumpkin v. Ricketts, 551 F.2d 680, 682 n. 2 (5th Cir. 1977), cert. denied, 434 U.S. 957 (1977)(applying state law in effect at time of trial); Freeman v. Georgia, 599 F.2d 65, 71 (5th Cir. 1979), cert. denied, 444 U.S. 1013 (1980) (rejecting state finding of procedural waiver where the court did not cite specific rule which was violated); Maxwell v. Sumner, 673 F.2d 1031, 1034 (9th Cir. 1982), cert. denied, 459 U.S. 976 (1982) (examining state's claim of procedural bar, and finding no such procedural rule).

In its opinion, the Court of Appeals surveyed the law of the state within its circuit. A. 11-17. 793 F.2d

625. At the time of Mr. Wheat's application the accepted method for post-conviction relief in Mississippi was the writ of error coram nobis. Edwards v. Thigpen, 433 So.2d 906, 907 n.1 (Miss. 1983). The use of that writ in Mississippi as a means for post-conviction review in criminal cases has evolved over the last three-quarters of a century.

Initially limited in its application to civil cases, the Mississippi Supreme Court first applied the writ in criminal cases in Fugate v. State, 85 Miss. 94, 37 So. 554 (1904). Thereafter, relying upon a Mississippi law which codified and expanded the use of the writ, the court expanded the scope of coram nobis review from challenges to a trial court's jurisdiction to include presentation of newly discovered evidence which went to the "merits" of the trial. Lang v. State, 230 Miss.

147, 92 So.2d 670 (1957).

Later in In re Broom's Petition, 251 Miss. 25, 168 So.2d 44, 47-48 (1964), the court expressly recognized that the writ was available for claims asserting "the right to a new trial upon the ground that the sentence was imposed in violation of the Constitution".

Since Broom, the court has reaffirmed that the writ is available for claims asserting constitutional violations. See, e.g., Phillips v. State, 421 So.2d 476, 483 (Miss. 1982) (coram nobis available for a "collateral attack based upon constitutional defects . . ."); Nelson v. Tullos, 323 So.2d 539, 543 (Miss. 1975)("In this jurisdiction relief for a defendant who claims to have been convicted as the result of a deprivation of his constitutional rights is by writ of error coram nobis");

Botts v. State, 210 So.2d 777, 779 (Miss. 1968)("the violation of the constitutional right . . . to counsel constitutes ground for granting a writ of error coram nobis"); Fondren v. State, 199 So.2d 625 (Miss. 1967)(post-conviction relief granted for constitutional claim of exclusion of Blacks from juries); Windom v. State, 192 So.2d 689, 691 (Miss. 1966), ("This Court has provided a plain, adequate and speedy post-conviction remedy for adjudication of all issues that may be raised under the United States . . . Constitution").

The Court of Appeals and the district court in this case as well as two other federal district courts in Mississippi, Pruett v. Thigpen, No.EC84-31-LS-D (N.D.Miss, No. 21, 1984); Edwards v. Thigpen, 595 F.Supp. 1271, 1278 (S.D.Miss 1984), have all concluded that until it considered Mr. Wheat's

application for coram nobis relief, the Mississippi Supreme Court had consistently reviewed the merits of constitutional issues raised in post-conviction proceedings in death cases. [3]

As acknowledged by the Attorney General in seeking the procedural bar eventually announced in this case,

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[3] The Mississippi Supreme Court has vacated a death sentence because of improper prosecutorial arguments identical to those made in this case even when no objections had been raised at trial. See Williams v. State, 445 So.2d 798, 810 (Miss. 1984). And, in Caldwell, which came to the Mississippi Supreme Court in exactly the same procedural posture as Wheat (a contemporaneous objection was made at trial to the prosecutor's argument, but the issue was not assigned as error on appeal), the Mississippi Supreme Court raised the issue sua sponte. Caldwell v. State, 443 So.2d 806, 813 (Miss. 1983). On certiorari to this Court, the State, as it does in this case, asserted that the claim was procedurally barred. 86 L.Ed.2d at 238. However, this Court rejected the argument and held that the Mississippi Supreme Court had addressed the merits of the federal claim. 86 L.Ed.2d at 238-239.

"[i]n line with this doctrine of enhanced review, [the Mississippi Supreme] Court has in the past considered with few exceptions all claims [in death penalty cases], . . . in a post-conviction petition presented to it. See: Bell v. Watkins, 381 So.2d 118 (Miss. 1980); In re Jordan, 390 So.2d 584 (Miss. 1980)."[4]

In Bell, the Court "carefully and meticulously considered each allegation" on the merits, including seventeen claims which were raised for the first time on coram nobis. 381 So.2d at 119. Similarly, in Jordan, where the

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[4] "Response to Application for Leave to File a Petition for Writ of Error Coram Nobis and/or Writ of Habeas Corpus" filed in Edwards v. Thigpen, introduced as an exhibit below, at 22. As will be discussed infra, Edwards, 433 So.2d 906 (Miss. 1983), was part of a trilogy of cases in which the Mississippi Supreme Court adopted the position asserted by the Attorney General and discontinued its practice of reviewing "all claims" presented to it on applications for coram nobis relief.

petitioner raised three new claims on coram nobis, the Court rejected the claims without relying on the fact that they had not been raised on direct appeal.

The same occurred in every other capital case which came before the Court prior to Mr. Wheat's. Culberson v. State, 412 So.2d 1184 (Miss. 1982) (court reaches merits of claims in coram nobis); Bullock v. State, Miss. S. Ct. No. 51,937 (unpublished order dated Oct. 7, 1981) ("The Court . . . has considered the grounds stated in the application . . . and finds the application lacks merit and should be denied."); Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982), rehearing denied with opinion, 685 F.2d 139 (5th Cir. 1982), cert. denied, 461 U.S. 910 (1983) (court finds Mississippi court ruled on merits of claims); Voyles v. Watkins, 489 F. Supp. 901, 912 n. 7 (N.D. Miss. 1980)

(court describes Mississippi practice to review capital cases without regard to assignment of error); Jones v. Thigpen, 555 F. Supp. 870, 873 (S.D. Miss. 1983) (court holds that Mississippi ruled on merits of coram nobis), mod. on other grounds, 741 F.2d 805 (5th Cir. 1984).

Thus, as found by the courts below, until the filing of Mr. Wheat's application for a writ of error coram nobis, the Mississippi Supreme Court had consistently considered the merits of claims asserted in such applications. Then, in a trilogy of cases, one of which was Mr. Wheat's case, the Mississippi Supreme Court, announced a new policy of refusing to consider claims asserted for the first time on coram nobis in capital cases. Wheat v. Thigpen, 431 So.2d 486 (Miss. 1983); Edwards v. Thigpen, 433 So.2d 906 (Miss. 1983), Smith v. State, 434 So.2d 212 (Miss. 1983).

In two later cases, Evans v. State, 441 So.2d 520 (Miss. 1983) and King v. Thigpen, 441 So.2d 1365 (Miss. 1983), several justices of the Mississippi Supreme Court, supporting the conclusion of the Court of Appeals, observed that these decisions were a marked contrast to the Mississippi Court's treatment of similar claims in previous cases in which that "Court has repeatedly allowed presentation of constitutional issues which could have been litigated at trial or on direct appeal but for various reasons were not." Evans, 441 So.2d at 525 (Robertson, J., dissenting):

> For at least two decades the writ of error coram nobis has been a post-conviction form of action through which prisoners of the state have filed constitutional challenges to their convictions and sentences. We have venerated this writ, for it fulfills our felt obligation to assure that no person experiences the sting of the state's penal sanctions inconsistent with the constitution.

. . .

> Today's decision renders the writ of error coram nobis an empty form of action. It is still on the books. There is simply not much of any importance it may be used for.

Id. at 524.

As noted by the dissenting justices on the Mississippi court and the Court of Appeals in its opinion below, the change in treatment of coram nobis applications by the Mississippi Court came in response to a plea by the State to impose procedural bars for the express purpose of preventing federal habeas corpus review. As described by the minority in Evans:

> . . . The State is saying we should hold Evans' claims procedurally barred, not because such would promote the interests of justice, but rather that such would pull the rug out from under Evans when he ultimately seeks federal review of his case. The State not only asks that we refuse to address Evans' claims on their merits but unashamedly further seeks our aid in avoiding litigation of Evans sixteen federal constitutional claims in any federal court.

Id. at 531 [emphasis original]. The dissenters found the newly found "affec-

tion for procedural bars to be particularly unseemly" because the Attorney General's "undisguised demand that this Court assume an adversary position" was made only after seven death sentences had been vacated by the federal courts due to constitutional violations. Id. at 531-32.[5]

As the State has established, the Fifth Circuit has been vigilant in refusing to address federal claims which were procedurally forfeited in state courts. Petition at 21-25. See, e.g.,

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[5] As observed by the Court of Appeals the "undisguised demand" was presented in the State's Response to the application for coram nobis relief in Edwards v. Thigpen, one of the trilogy of cases in which the new policy was applied. That Response was submitted as an exhibit to the District Court below and summarized by the Court of Appeals. A. 18-20. In it, the State urged the Mississippi court to begin a new practice of declaring claims presented for the first time in post-conviction proceedings by capital defendants to be procedurally barred expressly for the purpose of preventing federal review of those claims.

Bass v. Estelle, 696 F.2d 1154, rehearing denied with opinion, 705 F.2d 121 (5th Cir. 1983), cert. denied, 464 U.S. 865 (1983)(court defers to declaration of procedural forfeiture by state courts and rejects assertion that Texas courts do not regularly apply procedural bars). The Fifth Circuit has fully honored procedural bars imposed by the Mississippi Supreme Court in other cases, where the state court regularly declares procedural rules that are clearly announced to the litigants. Young v. Herring, 777 F.2d 198 (5th Cir. 1985). [6]

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[6] Despite strict adherence by the Fifth Circuit to the principles of Wainwright v. Sykes, the State argues that the Court of Appeals "ignored" its own precedent by failing to follow Bass, Young and Henry v. Wainwright, 686 F.2d 315 (5th Cir. 1982). However, these cases were fully briefed to the Court of Appeals below, members of which had decided those cases. Each of the cases isclearly distinguishable.

[Footnote continued next page.]

In reviewing the history of Mr. Wheat's case, however, the Court of Appeals reached the same conclusion as that reached by the other federal district courts that also reviewed the practices of the Mississippi Supreme Court in capital cases:

[Footnote 6 continued]

Young is a noncapital cases and has no applicability to this case. Bass involved a new procedural rule which was only applied by the Texas courts prospectively, and not retroactively as in Mr. Wheat's case. Henry involved only the question whether the state court actually had invoked a procedural bar or ruled on the merits of the claim, not the issues in this case, whether the procedural rule had been announced and fairly applied to all litigants. Rather than "ignore" its own precedent, the Court of Appeals simply recognized that those cases have nothing to do with the issue in this case. Thus, none of these cases presents a reason for granting certiorari.

> In the years immediately preceding Wheat's appeal the Mississippi Supreme Court routinely reviewed claims made for the first time on writ of error coram nobis. The first case where the court expressly declares that it will not consider claims raised the first time on writ of error coram nobis is the case involving Wheat's petition. Wheat v. Thigpen, 431 So.2d 486 (Miss. 1983). In a series of cases following Wheat the court held that it would not consider claims raised for the first time on writ of error coram nobis. King v Thigpen, 441 So.2d 1365 (Miss. 1983); Evans v. State, 441 So.2d 520 (Miss. 1983); Smith v. State, 434 So.2d 212 (Miss. 1986); Edwards v. Thigpen, 433 So.2d 906 (Miss. 1986) . . . . We also note that the State admits in a brief filed in another case that the Mississippi Supreme court 'has in the past considered with few exceptions all claims, either on direct appeal or in a post-conviction petition presented to it . . . . We are therefore persuaded that the Mississippi Supreme Court had not clearly announced or strictly or regularly followed the procedural bar at the time of Wheat's direct appeal.

793 F.2d at 627 (footnote omitted).

Accord, Pruett v. Thigpen; Edwards v. Thigpen; Johnson v. Thigpen, No. J84-0501 (B) (S.D. Miss. December 13, 1985).

Thus, the Mississippi Supreme Court created:

> a situation where a state court has followed a regular past practice of entertaining claims in a procedural mode, and without notice has abandoned that practice to the detriment of a litigant who finds his claim foreclosed by a novel procedural bar. . . . [A] procedural requirement has been sprung upon an unwary litigant when prior practice did not give him fair notice of its existence.

Walker v. City of Birmingham, 388 U.S. 307, 319 (1967), citing Barr v. City of Columbia, and Wright v. Georgia, 373 U.S. 284, 291 (1963).

The State, string citing a number of cases, essentially argues that this Court should grant certiorari to undertake an analysis of Mississippi cases to see if the Court of Appeals was correct in its conclusion.

All of the cases cited by the State were fully briefed and argued to the courts below, including the Court

of Appeals. [7] It is axiomatic that this Court customarily defers to Federal Courts of Appeals on questions of state law. See, e.g., Pembaur v. Cincinati 475 U.S. ___, ___n.13, 106 S.Ct. 1292, 1301, n.13, 89 L.Ed.2d 452 (1986); Regents of University of Michigan, v. Ewing, 474 U.S. ___, ___, n.10, 106 S.Ct. 507, 513 n. 10, 88 L.Ed.2d 253 (1985); United States v. S.A. Epresa de Viacao Area Rio Grandese, 467 U.S. 797, 815, n.12 (1984);

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7 As was demonstrated to the Court of Appeals, virtually all of the cases cited by the State where the Mississippi Supreme Court did not reach the merits of claims raised in post-convcition are either noncapital cases or capital cases decided before Furman, after which the Mississippi Court began its regular practice of reviewing capital cases in a comprehensive way. With respect to those cases where the Mississippi Court did review the merits of claims raised for the first tiem in post-conviction proceedings, the State's only repsonses are that they were not "really" decisions on the merits but merely "descriptions" or "chronicling" of the claims presented. As the Court of Appeals found, however, the decisions of the Mississippi court belie this assertion.

Bishop v. Wood, 426 U.S. 341, 345-47 (1976); Proper v. Clark, 337 U.S. 472, 486-87 (1949). It has done so when the issue involves application of state procedural rules which prevent review of federal rights. See, e.g., Jenkins v. Anderson, 447 U.S. 231, 234, n.1 (1980)("The applicability of the Sykes 'cause' and 'prejudice' test may turn on an interpretation of state law . . . . This Court's resolution of such state-law questions would be aided significantly by views of other federal courts that may possess greater familiarity with [state] law"); Rummel v. Estelle, 445 U.S. 243, 267, n.7 (1980)("Deferring to the Court of Appeal's interpretation of Texas law, we decline to hold that Wainwright bars Rummell from presenting his claim"). The State has offered no justification why that rule should not be followed in this case.

The Court of Appeals fully considered each of the arguments and cases presented to this Court by the the State. The Court of Appeals was correct in concluding that the new procedural policy announced by the Mississippi Supreme Court in Mr. Wheat's case is not an independent and adequate state ground which prevents vindication of his federal rights.[8]

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[8] For this reason, the Fifth Circuit did not reach the question of cause for the failure to assign the issue as error and prejudice. However, because the Mississippi court had not announced its new restrictive rule, Mr. Wheat's failure to present the claim on direct appeal, in light of the foregoing, was not attributable to an "intentional decision by counsel made in pursuit of his client's interest". Reed v. Ross, 468 U.S. ___, 104 S.Ct. 2901, 2909, 82 L.Ed.2d 1 (1984). Additionally, the failure of counsel to "raise a constitutional issue reasonably unknown to him is one of the situations in which the cause requirement is met". Id. Caldwell did not settle the question until last year. The Eleventh

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The State has not established that this case presents any unique or important questions of federal law, or that the decision of the Court of Appeals conflicts with decisions by other courts. In fact, the decision by the Court of Appeals is fully supported by the decisions of this Court and other federal courts. Accordingly the petition should be denied.

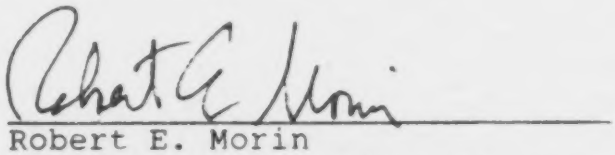
[Footnote continued from previous page.]

Circuit has recently ruled that because the decision in Caldwell represented a significant change in the law which was not reasonably anticipated until the decision was made, "cause" exists for the purposes of federal review. Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986). Thus, even if Mississippi had imposed a procedural bar which was worthy of federal court deference, Mr. Wheat would still be entitled to federal court review. See, e.g., Reed v. Ross; Wainwright v. Sykes, 433 U.S. at 95-96; Huffman v. Wainwright, 651 F.2d 347, 351 (5th Cir. 1981).

CONCLUSION

For the foregoing reasons the petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing was mailed postage prepaid this 23rd day of February, 1987, to Marvin L. White, Office of the Attorney General, P.O. Box 220, Jackson, Mississippi, 39205.